

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

WINN-DIXIE STORES, INC.,)	
ET AL,)	
)	Case No. 15-6480
)	
Plaintiff(s),)	
)	
)	
v.)	Philadelphia, Pennsylvania
)	September 4, 2019
EASTERN MUSHROOM)	10:30 a.m.
MARKETING COOPERATIVE,)	
INC., ET AL,)	
)	
Defendant(s).)	
)	

TRANSCRIPT OF RULE 16 CONFERENCE
BEFORE THE HONORABLE BERLE M. SCHILLER
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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1 PHILADELPHIA, PENNSYLVANIA

2 WEDNESDAY, SEPTEMBER 4, 2019

3 (PROCEEDINGS HELD IN OPEN COURT:)

4 HONORABLE JUDGE BERLE M. SCHILLER: Morning.

5 MULTIPLE VOICES: Morning, Your Honor.

6 THE COURT: This is case Winn-Dixie Stores, Inc.,
7 et al, versus Eastern Mushroom Marketing Cooperative, Inc.,
8 et al, number 15-6480. Counsel, identify yourselves for
9 the record and who you represent.

10 MR. PATRICK AHERN: Patrick Ahern on behalf of
11 the Winn-Dixie Plaintiffs, Your Honor.

12 MR. WILLIAM DESTEFANO: Good morning, Your Honor.
13 William DeStefano on behalf of the EMMC and various members
14 identified.

15 THE COURT: Okay.

16 MR. MAXWELL KOSMAN: Maxwell Kosman on behalf of
17 the Giorgi entity.

18 MS. DONNA ALBANI: Donna Albani for M.D. Basciani
19 & Sons, Inc., Your Honor.

20 MR. JAMES RODGERS: James Rodgers for Franklin.

21 MS. BARBARA SICALIDES: Barbara Sicalides, Pepper
22 Hamilton, on behalf of Creekside Mushrooms.

23 MS. JACQUELINE RUBIN: Jacqueline Rubin on behalf
24 of Giorgi with Mr. Kosman.

25 THE COURT: Okay.

1 MR. JOEL FISHBEIN: Joel Fishbein on behalf of
2 (inaudible).

3 THE COURT: Okay, please be seated. The purpose
4 of this Rule 16 was to establish certain ideas about when
5 you -- what your schedule is proposed. I saw what you did,
6 and I have some ideas myself, and I have some questions for
7 all of you about how we're going to proceed. So, let me
8 start with some questions.

9 First of all, has there been an exchange of the
10 discovery materials from the related class and opt-out
11 litigation?

12 MR. AHERN: No, Your Honor. We've asked for it,
13 but we haven't gotten it.

14 MR. DESTEFANO: We were under the understanding
15 that Mr. Ahern was going to be receiving --

16 THE COURT: Excuse me?

17 MR. DESTEFANO: We were under the understanding
18 that --

19 THE COURT: You can sit down.

20 MR. DESTEFANO: -- that Mr. Ahern was going to be
21 receiving all of those materials from the other two opt-
22 outs, who have that and have had it for a long time. And
23 indeed, Mr. Ahern quoted liberally from that discovery in
24 his amended complaint. So, we were under the assumption
25 that he already had at least part of it and would be

1 receiving those materials from counsel from Publix and
2 Giant Eagle, who already had that -- they participated in
3 the entire 13-year history of this case. So, they already
4 had it. So --

5 THE COURT: Have you -- Have you bothered to ask
6 them for the discovery?

7 MR. AHERN: I have asked them. Before Your Honor
8 granted the motion for consolidation -- I mean, denied the
9 motion for consolidation, we did ask Publix and -- and
10 Giant Eagle, and they were in the process of, you know,
11 working out various issues here regarding when this trial
12 was going to be. So, they did not --

13 THE COURT: Forget that. I want them to give you
14 the material.

15 MR. AHERN: Well, Your Honor, they're not parties
16 to my case right now. This case is a separate case, and I
17 don't think that our discovery should be truncated. We are
18 entitled as a separate case, and this is what the
19 Defendants wanted. So, fine, let's deal with this --

20 THE COURT: No, it's what I want.

21 MR. AHERN: Okay.

22 THE COURT: Forget what they want.

23 MR. AHERN: Well, Your Honor granted the
24 motion --

25 THE COURT: I want to know why you don't have any

1 discovery materials.

2 MR. AHERN: Because -- because --

3 THE COURT: You're not going to start from square
4 one for discovery.

5 MR. AHERN: Well, Your Honor --

6 THE COURT: All this discovery was done already.

7 MR. AHERN: Your Honor, I'm not saying we would
8 start from square one, but there are documents that the
9 Defendants have. They're just trying to lighten their own
10 burden to produce the documents that they produced to the
11 DOJ, that should be easy, to produce prior testimony,
12 relevant testimony, and to produce their sales data. All
13 of that we're entitled to.

14 And Giant and -- Publix and Giant Eagle are not
15 parties to this case. If they refuse to give it to us, and
16 they indicated they weren't sure if their databases were
17 complete, so they had some reluctance in doing so. Now,
18 I'm going to have to subpoena them. That doesn't seem
19 right to me.

20 MR. DESTEFANO: Your Honor, it was our
21 understanding that -- that -- that Mr. Ahern had already
22 worked out an agreement with Publix and Giant Eagle. I
23 don't hear him --

24 THE COURT: Well, he didn't.

25 MR. DESTEFANO: -- saying that -- that --

1 THE COURT: He didn't.

2 MR. AHERN: Yeah.

3 MR. DESTEFANO: Well, I'm not sure he did, or he
4 didn't.

5 THE COURT: I don't care whether he did, or he
6 didn't.

7 MR. DESTEFANO: It's up in the air.

8 THE COURT: I'm just saying that he wants
9 discovery. What material -- do you know the materials you
10 want?

11 MR. AHERN: We do. We asked -- We propounded
12 discovery requests two years ago. Those have never been
13 responded to, but at least the three categories that I just
14 mentioned to Your Honor: The documents that they produced
15 to the DOJ, the -- their sales data, and any prior relevant
16 testimony, which we're entitled to either for impeachment
17 or as party admissions.

18 THE COURT: All right. I want -- did you get
19 those requests from him?

20 MR. DESTEFANO: Well, the DOJ documents are
21 already bundled into the materials produced to Publix and
22 Giant Eagle as well as the class. So, I'm assuming that if
23 he does get them from Publix and Giant Eagle --

24 THE COURT: Assume he's not going to get
25 anything.

1 MR. DESTEFANO: Okay.

2 THE COURT: He wants to sit. He doesn't want to
3 do anything except if he gets it from you. Understand?
4 That's what's going on here --

5 MR. DESTEFANO: Right.

6 THE COURT: -- is diligence, a lack of it.

7 MR. AHERN: Well, Your Honor, to be fair --

8 THE COURT: You waited 13 years to get off your
9 butt to move this case.

10 MR. AHERN: Your Honor, to be fair, I never told
11 them that I had made a deal with Publix --

12 THE COURT: I don't care whether you did, or you
13 didn't. All the time you've wasted. You could have asked
14 me.

15 MR. AHERN: I did ask, and I also asked them.

16 THE COURT: What did you ask of me?

17 MR. AHERN: I've asked repeatedly to have
18 those --

19 THE COURT: You didn't ask me.

20 MR. AHERN: -- materials given.

21 MR. AHERN: Well, I -- I asked repeatedly and
22 Judge O'Neill put this on a stay until we opted out of the
23 class, which was maybe nine months to a year ago. I've
24 been seeking this material for a long time, Your Honor,
25 since we filed.

1 THE COURT: Since you filed.

2 MR. AHERN: Right.

3 THE COURT: But never once did you ask me.

4 MR. AHERN: I apologize for that, Your Honor.

5 THE COURT: All right. Now I want those
6 responded to. All the material that he's asked for, I want
7 it responded to, all right? You have the documents and so
8 on and so forth, okay? What else, Mr. Ahern?

9 MR. AHERN: Your Honor, we have the schedules
10 here. The big picture is that they're pretty similar.
11 Most of the dates are agreed to or very close.

12 THE COURT: Well, I'm going to go over some new
13 dates.

14 MR. AHERN: Okay. The -- the only issue on the
15 schedule, I would say, is that our -- we have the Daubert
16 deadline, the same as --

17 THE COURT: Forget the Daubert. I'm going to go
18 over that with you.

19 MR. AHERN: Oh, okay.

20 THE COURT: My question was the discovery
21 materials. But now we know I want those questions
22 responded to, so that they can get all the discovery
23 they've asked for.

24 MR. DESTEFANO: We're prepared to give them all
25 the depositions, all the documents that were marked during

1 the depositions, and that pretty much does it. The expert
2 materials that were done, I don't think -- I think he's
3 getting his own expert. I'm not sure he needs it.

4 THE COURT: Well, I'm going to find that out.

5 MR. DESTEFANO: Yeah.

6 THE COURT: All right?

7 MR. DESTEFANO: Yeah.

8 THE COURT: All right. He'll get that stuff to
9 you.

10 MR. AHERN: Your Honor, we -- we would like
11 responses to our written discovery requests, including our
12 interrogatories, because we've also served interrogatories
13 on them. And I'm not sure -- I don't have the
14 interrogatory responses from -- from the previous case, and
15 I'm not sure that --

16 THE COURT: All right. Well, let me -- I'm going
17 to deal with that. I just -- I'm just getting a little
18 understanding of what you've -- people have done or not
19 done. Mostly, it's not done. Now, what discovery do
20 Defendants need from the Winn-Dixie/Bi-Lo people?

21 MR. DESTEFANO: As -- As putting aside expert
22 discovery --

23 THE COURT: Yeah.

24 MR. DESTEFANO: -- fact discovery, our best --

25 THE COURT: You're going to -- you're going to do

1 what you have to do to get that discovery, take
2 depositions, et cetera, request documents?

3 MR. DESTEFANO: Yes, yes.

4 THE COURT: Okay. You'll do that in the ordinary
5 course?

6 MR. DESTEFANO: Yes.

7 THE COURT: And I'll set a schedule for that.
8 Now, what discovery does Winn-Dixie/Bi-Lo need from
9 Defendants that is specific to Winn-Dixie/Bi-Lo's mushroom
10 purchases?

11 MR. AHERN: Your Honor, with respect to that, we
12 would be seeking probably very limited depositions, if we
13 need to, 30(b)(6), just on specific things as to just our
14 purchases from them. We would be looking for their
15 purchase -- their sales data to us, which you've already
16 said is a category that they should provide.

17 THE COURT: Right.

18 MR. AHERN: And beyond that, I'm not sure what
19 else, but we would do that in the normal course.

20 THE COURT: Okay.

21 MR. DESTEFANO: Can I add something to that?

22 THE COURT: Yes.

23 MR. DESTEFANO: Apparently, Mr. Ahern already has
24 Winn-Dixie and Bi-Lo's purchase data because he sent it to
25 us attached to a response to a motion at some point. So,

1 if he already has something, I'm not sure --

2 THE COURT: I just want to make sure that there's
3 no information that hasn't been turned over in one form or
4 another, whether it was a part of something else or it's
5 part of this.

6 MR. DESTEFANO: All right.

7 THE COURT: All right?

8 MR. DESTEFANO: I believe he has already has the
9 sales --

10 THE COURT: I'm going to give you a schedule --

11 MR. DESTEFANO: Yeah.

12 THE COURT: -- and I want to make sure it's
13 complied with.

14 MR. DESTEFANO: Sure.

15 MR. AHERN: Your Honor, just on that one point,
16 oftentimes, the Defendant's data is going to be different
17 in scope of time and other aspects that the Plaintiff's
18 data. So, the fact that we may have shared our data or
19 attached our data doesn't mean we don't need theirs.

20 THE COURT: Well, whatever it is, you're going to
21 ask the questions. You'll get the answers. So, that was
22 what discovery does Winn-Dixie/Bi-Lo need from the
23 Defendants, specific to Winn-Dixie/Bi-Lo's mushrooms
24 purchased. Okay. Has Winn-Dixie/Bi-Lo selected an expert
25 witness?

1 MR. AHERN: Your Honor, we would probably seek to
2 use Mr. Leffler if -- after he finishes his trial before
3 Your Honor on behalf of Publix and Giant Eagle. If we
4 can't use him --

5 THE COURT: Well, let me tell you something.

6 MR. AHERN: Yes, sir.

7 THE COURT: I'm not waiting for that trial to be
8 over. I'm -- I'm going to give you a -- I'm going to give
9 you a pre-trial schedule, and the way I've tentatively
10 drawn it up for myself here is that it all ends July 20th
11 of 2020. So, there's going to be overlap. So, if you
12 think you're going to be able to talk to this expert and
13 wait till that trial is over, you may be sorely mistaken.

14 MR. AHERN: Well, based on Your Honor's comment
15 right now, then if we can't use him, we'll get somebody
16 else.

17 THE COURT: All right. Will the Defendants need
18 additional expert testimony?

19 MS. SICALIDES: Your Honor, on behalf of
20 Creekside Mushroom, we had no expert in the original case
21 because we were settled out of the case. So, we will need
22 an expert.

23 THE COURT: Fine. Okay. All right.

24 MR. KOSMAN: The same is true of Giorgi, Your
25 Honor.

1 THE COURT: Okay. Is there any reason why the
2 parties believe they -- well, I'm going to give you the
3 deadlines, and I want to see what -- what your comments
4 are? Now, let me ask you this. Have you ever sat down
5 with one another to discuss settlement? Anybody, anytime,
6 anywhere?

7 MS. SICALIDES: We have endeavored to do so, Your
8 Honor.

9 THE COURT: You've tried to do that?

10 MS. SICALIDES: We have endeavored to do so, Your
11 Honor. Yes.

12 MR. AHERN: Yeah.

13 MS. SICALIDES: Twice.

14 MR. AHERN: We have -- well, I mean, to be fair,
15 we made a demand --

16 THE COURT: Well, no, let's be fair. Yes, that's
17 right. It's a good idea.

18 MR. AHERN: To be fair to Ms. Sicalides' comment,
19 we made a demand, and I don't believe we ever got a
20 response back. We have had isolated discussions with
21 certain of the Defendants. We have not had a discussion
22 with -- with all of this -- the EMMC and the certain
23 Defendants.

24 There was a comment that was made that -- that
25 very quickly, at least, they might see whether or not there

1 was an opportunity to resolve it, but after that comment
2 two months ago, three months ago, we haven't heard -- we
3 haven't heard --

4 THE COURT: I can understand why nothing's been
5 done because things kind of float around, and we got -- you
6 were kind of put off to the side, considering what was
7 going on ahead of you. Go ahead.

8 MS. SICALIDES: I'm just going to say that I
9 disagree with the characterization of the discussions, that
10 we approached them very, very early. We have spoken to
11 them more than once. We did make a proposal which counsel
12 apparently has forgotten. So, I would just say I disagree
13 with the characterization --

14 THE COURT: Okay.

15 MS. SICALIDES: -- and leave it at that.

16 THE COURT: As long as -- I just -- I just wanted
17 to know whether there was any discussions going on.

18 MS. SICALIDES: Well, there was --

19 THE COURT: And now there's --

20 MS. SICALIDES: -- a sincere effort --

21 THE COURT: -- there's probably --

22 MS. SICALIDES: -- on Creekside's part to resolve
23 the issues.

24 THE COURT: Good. Okay.

25 MR. AHERN: I mean, one other comment, Your

1 Honor. We have -- we have resolved with -- with at least
2 one of the Defendants.

3 THE COURT: Excuse me?

4 MR. AHERN: We have resolved with at least one of
5 the Defendants, and we did that several months ago, and
6 Your Honor did the stipulation for dismissal on that.

7 THE COURT: Okay. Do -- I guess there's no
8 disagreement that you believe that settlement discussions
9 would be productive. The question is when would they be
10 productive? At this time, in the future, when? I mean, I
11 want to know are you going to sit down and talk to one
12 another?

13 MR. DESTEFANO: Yeah, let me -- let me explain
14 what we're doing. We've done considerable work on Winn-
15 Dixie and Bi-Lo's theoretical damages through our expert
16 because we had that information available, and indeed,
17 during the ongoing class action, both experts did specific
18 regression models regarding and came out with opinions on
19 Winn-Dixie's damages and Bi-Lo's damages.

20 THE COURT: Right.

21 MR. DESTEFANO: What we were prepared to do after
22 our settlement got approved, which was just a week ago, I
23 guess, or at least preliminarily approved a week ago, was
24 to make an offer to Mr. Ahern with -- with those numbers in
25 mind.

1 THE COURT: All right.

2 MR. DESTEFANO: And we'll do so. Now, that --
3 that can happen, let's say, next week, and --

4 THE COURT: All right. Whatever. I just want to
5 know -- the whole purpose of this line of questioning is to
6 make sure that the parties are actually actively trying to
7 talk to one another. I don't want last minute kinds of
8 things. If you're going to talk, then talk. There's a lot
9 of information out there. There's been expert reports.
10 There's been studies. This isn't starting from -- from
11 zero.

12 MR. AHERN: We don't have access to any of that.

13 THE COURT: You don't have access to what?

14 MR. AHERN: To any of that. So, to the extent
15 that they come up and they say, well, this is what our
16 expert analysis shows, we don't have access to any of that
17 information.

18 THE COURT: It's your -- it's your comment that
19 you have never seen an expert report that talks about your
20 clients.

21 MR. AHERN: In this case, correct.

22 THE COURT: Okay. All right. So, there you go.

23 MR. DESTEFANO: Well, that's because all of that
24 stuff was done in the class action --

25 THE COURT: Whatever -- whatever the reason is.

1 MR. DESTEFANO: All right. Yeah.

2 THE COURT: If you're going to have a settlement
3 discussion with Mr. Ahern, give him the material that
4 you're basing it on.

5 MR. DESTEFANO: Of course.

6 THE COURT: Okay. All right. I'm proposing that
7 the fact discovery deadline would be January 20th, 2020.
8 I've seen your proposals. I'm condensing most of that.

9 MR. AHERN: Your Honor, may I just say that I
10 have a two-week trial starting in front of Judge Davis in
11 the middle District of Florida in federal court in
12 Jacksonville. It's been moved several times. It's a must-
13 go January 6th.

14 THE COURT: Good. Well, you should have that
15 discovery done before January 20th.

16 MR. AHERN: And I'm also on trial in front of
17 Judge Pratter (phonetic) starting on October --

18 THE COURT: On the eggs. I understand that.

19 MR. AHERN: -- through Christmas.

20 THE COURT: Good.

21 (Break in Audio)

22 MR. DESTEFANO: -- Mr. Ahern is willing to sign
23 the confidentiality or it's already in place with -- under
24 Judge O'Neill.

25 THE COURT: All right. He's willing to sign it.

1 MR. DESTEFANO: Yeah.

2 THE COURT: So, get a confidentiality order.

3 That's a good point, Ms. Albani.

4 MS. ALBANI: Albani. Thank you, sir.

5 THE COURT: Albani.

6 MS. ALBANI: That's okay.

7 THE COURT: Good. That takes care of that. Is
8 there anything else? Now, who's -- who's the -- who's the
9 lead counsel here? Is it you again, Mr. DeStefano?

10 MR. DESTEFANO: I'd like to pass the baton to --

11 THE COURT: Is it Mr. Montague? You sit here
12 quiet --

13 MR. DESTEFANO: -- to Paul Weiss.

14 THE COURT: That's the quietest I've ever seen
15 him in a courtroom.

16 MR. MONTAGUE: I'm observing, Your Honor.

17 THE COURT: He's an observer. Okay.

18 MR. DESTEFANO: By weight of number of Defendants
19 represented, I guess I have the --

20 THE COURT: What's that?

21 MR. DESTEFANO: By weight of number of Defendants
22 represented, I have to default, I suppose, to that, the
23 lead counsel.

24 THE COURT: All right. Again, I'm available if
25 you want to have a discussion. Ms. Albani, you can come

1 see me.

2 MS. ALBANI: Thank you, Your Honor.

3 THE COURT: I won't accuse you of any ex-parte
4 any things and neither will they. So, we'll try to get
5 this thing resolved if I can be helpful. I feel good
6 about what we've been able to accomplish up till now. So,
7 if I can be of further assistance, I'll be happy to do
8 that, so --

9 MR. AHERN: Thank you, Your Honor.

10 THE COURT: -- all right? So, I will send out my
11 scheduling order to you all. All right?

12 MR. AHERN: Thank you.

13 THE COURT: All right, thank you very much. I
14 hope you had a good summer and a good Labor Day weekend.
15 Now, we have to come to work.

16 MR. AHERN: Thank you, Your Honor.

17 THE COURT: All right.

18 (Proceedings concluded at 10:52 a.m.)

19

1 CERTIFICATION

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3 I, Wendy Sawyer, court approved transcriber,
4 certify, that the foregoing is a correct transcript
5 from the official electronic sound recording of the
6 proceedings in the above-entitled matter.

7
8 October 1, 2019

9 Date

10
11 *Wendy K. Sawyer*

12 -----
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